IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

ORDER
IN
S.B. Civil Misc. Stay Application No.3054/2002
In
S.B. Civil Second Appeal No.538/2002

Aamna Widow of Abdul Sakoor & Others
...defendant-appellants
Versus
Thakurji Shri Krishan Bihariji Nadirji
Virajman, Jaipur City Chowkari Purani Basti
Rasta Nahargarh through Mahant Shri Sankarlal
and Sankar Lal S/o Ghishi Lal Tiwari
...plaintiff-respondents
AND
Abdul Rashid S/o Abdul Rajjak
...proforma-respondent

Date of Order ::: 04.10.2006

Present
Hon'ble Mr. Justice Narendra Kumar Jain

Shri M.M. Ranjan, Counsel for defendant-appellants
Shri P.C. Shah, Counsel for plaintiff-respondents
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By the Court:-

Heard learned counsel for the parties on the stay application under Order 41 Rule 5 read with Section 151 of the Code of Civil Procedure.

Learned counsel for the defendant-appellants submits that the appeal has already been admitted by this court on the substantial questions of law, therefore, the eviction decree passed against the defendant-appellants by both the courts below be stayed during pendency of this second appeal. Whereas

the learned counsel for the plaintiff-respondents submits that even if the appeal has been admitted on the substantial questions of law, it is not necessary to stay the eviction-decree in each and every case particularly when alternative accommodation has already been made available to the defendant-appellants and a decree of eviction has been passed in favour of the plaintiff-respondents on the ground of alternative accommodation made available to the defendant-appellants. He further submits that both the courts below have passed decree of eviction in favour of the plaintiff-respondents, therefore, the stay application should be dismissed. Alternatively, the learned counsel for the plaintiff-respondents submits that the rented property consists of seven rooms and three 'tibaras' and the total area of the rented premises is approximately 245 square yards and even as per the finding of both the courts below the defendants are using the rented premises as commercial premises. He further submits that the property was let out in the year 1961 and the defendants are paying monthly rent of Rs.60/- since 1961 i.e. for last 45 years, whereas the property is situated at Nahargarh Road, Jaipur, and at present the monthly rent of the rented premises is not less than Rs.20,000/-, therefore, in case any interim stay order is granted

against the eviction-decree, then at-least the mesne profit at the rate of Rs.20,000/- per month be awarded in favour of the plaintiff-respondent during the pendency of this second appeal.

The learned counsel for the defendant-appellants does not dispute the measurement of the rented premises and further that the defendant-appellants are paying only Rs.60/- per month of the rented premises for last more than 45 years i.e. since 1961. He further submits that at present the present market rate of monthly rent of the disputed premises is approximately Rs.1000/-. Learned counsel for the defendant-appellants, however, does not dispute that both the courts below have recorded a finding that the defendant-appellants are using the rented premises as commercial premises and the same is situated at fourth 'chauraha' of Nahargarh Road in Jaipur City.

The Hon'ble Supreme Court in the case of **Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd., (2005) 1 SCC 705**, considered the jurisdiction of the appellate Court while passing order of stay under Order 41 Rule 5 of the C.P.C., and held that the appellate court has jurisdiction to put the applicant under Order 41 Rule 5 of the C.P.C., on such reasonable terms as would, in its opinion, reasonably

compensate the decree-holder for loss occasioned by delay in execution of the decree by grant of stay, while passing the stay order in his favour, in the event of the appeal being dismissed. The Hon'ble Apex Court in the above referred case held as under :

> “19. To sum up, our conclusions are:
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> 1. While passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would, in its opinion, reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and insofar as those proceedings are concerned. Such terms, needless to say, shall be reasonable.
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> 2. In case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant

contained in clause (1) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.

3. The doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date".

The Hon'ble Supreme Court again in **Anderson Wright & Company Vs. Amar Nath Roy, 2005 DNJ (SC) 562,** while considering its earlier judgment in Atma Ram Properties (P) Limited's case (Supra) reiterated the same proposition of law.

This Court in Madan Bansal Vs. Ramnarayan Sharma, RLR 2006 (1) 733, considered the similar point and observed as under:

> "..... the criteria for admission of the appeal are altogether different than what adopted at the time of hearing of the appeal for final disposal. Even if the appeal is admitted by the First Appellate Court being a statutory appeal or second appeal as substantial question of law arises then it does not mean that it will be allowed finally. Once appeal is admitted, then it is commonly known, that it goes for hearing in Due Course and due to long list of pending old appeals, it takes quite considerable long time in its final disposal. In such circumstances a decree-holder is not only deprived of getting the possession of the rented premises, but also deprived of the monthly rent or the mesne profit or compensation for use and

> occupation of the rented premises as per the market value of the shop or the prevalent rent of the premises. The order 41 Rule 5 of the CPC gives jurisdiction to the appellate court to pass interim stay staying the execution of the decree but the interim stay order is required to be passed reasonably and while doing so the interest of decree-holder is also required to be protected."

After considering the admitted facts of the case as well as the rival submissions of the learned counsel for both the parties, I am of the view that once the second appeal is admitted, the eviction-decree passed against the defendant-appellants should be stayed and accordingly I stay the decree of eviction passed against the defendant-appellants by both the courts below, during the pendency of this second appeal, on the following terms and conditions:-

> That the defendant-appellants shall deposit the arrears of monthly mesne profit till 30th of September, 2006, as per directions of both the courts below, within a period of one month and shall further continue to pay/deposit the monthly mesne profit at the

rate of Rs.6000/- (Rupees six thousand only) per month, with effect from 1st October, 2006, by 15th day of each succeeding month, in the bank account of the plaintiff-respondents, the details of which will be furnished by the plaintiff-respondents within a period of two weeks to the defendant-appellants or their counsel. In case the details of the bank account are not furnished, then the defendant-appellants may deposit the amount, in question, in the lower court itself.

It is made clear that in case all the arrears of mesne profit/rent, as per the direction of both the courts below, are not deposited within a period of one month and the future mesne profit/rent, as directed above, is not deposited with effect from 1.10.2006, for consecutive two months, then it will be open for the plaintiff-respondents to get the decree, passed in thier favour by both the courts below, executed even during the pendency of this second appeal.

The stay application accordingly stands disposed of.

(Narendra Kumar Jain) J.

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